DEC 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-778

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

THE MESCALERO APACHE TRIBE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

George E. Fettinger
P.O. Drawer M
Alamogordo, New Mexico 88310

Attorney for Respondent

Of Counsel:

Kim Jerome Gottschalk
Norman D. Bloom, Jr.
Fettinger & Bloom
P.O. Drawer M
Alamogordo, New Mexico 88310

INDEX

STATEMENT OF THE CASE page

I. The Decision of the Tenth Circuit Does Not Conflict With the Decision of Any Circuit Court of Appeals..... 4

II. The Tenth Circuit's Concept of Tribal Sovereignty Is in Line With Decisions of This Court..... 6

III. The Tenth Circuit's Conclusion That Federal Law Preempts State Jurisdiction Over Hunting and Fishing on the Mescalero Apache Reservation Is Sound and Should Not Be Reviewed..... 8

IV. Application of New Mexico's Hunting and Fishing Laws on the Mescalero Apache Reservation Would Seriously Infringe on Tribal Self-Government Contrary to the Principle of Williams v. Lee..... 11

CONCLUSION 13

APPENDIX page

Stipulation 1a

CITATIONS

Cases: page

Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978), Petition for Writ of Certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980)..... 4,6-10

Fisher v. District Court, 424 U.S. 382, 390 (1976).....10

Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980) reh. denied, August 25, 1980, cert. applied for November 20, 1980. 9

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).... 7

United States v. Mazurie, 419 U.S. 544, 556-557 (1975).....10

United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979) cert. granted, No. 79-1128, 48 U.S.L.W. 3661 (April 14, 1980).....4,6

United States v. Wheeler, 435 U.S. 313 (1978).....7

United States v. Winans, 198 U.S. 371, 381 (1904).....8

Washington v. Confederated Tribes of the Colville Reservation, ————U.S.————, 65 L.Ed. 10 (1980).....9-12

White Mountain Apache v. Bracker, ———— U.S.————, 65 L.Ed.2d, 665, 672, (1980).....7-11-12

page

Williams v. Lee, 358 U.S. 217, 220 (1959).....7-11

STATUTES

Indian Reorganization Act of 1934, 25 U.S.C. § 461 8,9

Mescalero Apache Tribe Constitution 8-9

New Mexico Enabling Act, 36 Stat. 557 (1910) 8

Public Law 83-280, 67 Stat. 588 (1953) as amended, 18 U.S.C. §1162 (b) 8-10

Treaty With the Apaches, 10 Stat. 979 (1852).....8

MISCELLANEOUS

F. Cohen, Handbook of Federal Indian Law 286 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-778

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

THE MESCALERO APACHE TRIBE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Petitioners (hereinafter State) neglect to inform the Court that this case was presented to the District Court of New Mexico largely on stipulated facts. This Stipulation is attached hereto as an appendix. The corresponding page numbers in the record are pages 117-137 of Vol. I.

The Statement of the Case in the Petition is incomplete and misleading. The Petition implies that the Tribe's hunting and fishing program is carried on entirely in connection with the Inn of the Mountain Gods resort complex (Pet.p.3). Actually, the Tribe's hunting and fishing program existed long before the opening of the Inn in 1975. The only hunting and fishing related to the Inn are the package hunts and fishing at the Inn's lake. The majority of big game hunting is not related to the Inn, and the lake at the Inn is only one of several man-made lakes stocked for fishing on the Reservation.

While it is true that the State has in the past stocked streams on the Reservation, essentially all of this occurred prior to 1970. Between 1970 and 1976, the State stocked only a part of one stream and since 1976 has not stocked any part of any stream on the Reservation. None of the several man-made lakes has ever been stocked by the State. All waters within the Reservation are stocked with fish from the National Fish Hatchery at Mescalero (App.pp.123a-124a)

The fish hatchery is operated pursuant to an agreement between the Tribe and the Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior. Federal

personnel not only provide fish for the Reservation waters, but technical assistance as well. The agreement further provides that the Tribe will establish regulations for the conservation of fish resources, consistent, insofar as possible, with State regulation (App.p.123a). A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation based upon periodic surveys of all Mescalero Reservation fishing waters (App.p.124a).

The Petition also implies that a lone Bureau of Indian Affairs Range Conservationist is responsible for all of the deer, elk, antelope and bear population estimates upon which recommendations for seasons and bag limits are made to the Tribal Council. Actually, the Tribe employs seven full-time conservation officers who assist the range conservationist. All of these tribal personnel have received training in game and fish management and law enforcement (App.pp.122a-123a). In addition to formal training, these officers have substantial on-the-job experience. Id. While the State has participated in this training at the request of the Tribe, these requests have been limited (App.p.125a).

The State receives federal funds to support the administration of hunting and fishing in the state based on the number of state licenses sold and the number of acres of land in the state. The area of the Mescalero Apache Reservation is taken into account for this purpose, as were the number of state-licensed hunters and fishermen on the Reservation during the time such licenses were required by the Tribe (App.pp.125a-126a). However, within the boundaries of the Mescalero Apache Reservation, the State of New Mexico, in the last eight

years, (this statement made in 1978) has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places. The State has not adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or administration of fish resources, and has undertaken no wildlife restoration projects (Pet. 34a).

The only reference in the Petition to conflict between the Tribe and the State in respect to fish and game management is that tribal ordinance specifically provides that no State license is required. There are many other areas of conflict. Tribal seasons and bag limits for both hunting and fishing rarely, if ever, coincide causing annual conflict between the Tribe and the State (Pet. p.34a). Indeed, at the initiation of this lawsuit the Tribe was forced to obtain a temporary restraining order to prevent the State from arresting non-Indian hunters for hunting on the Reservation during one of the Tribe's big game seasons which began prior to the State's season. State law prohibits a person from hunting elk or antelope for two consecutive years, while tribal law does not (App.p.130a). This has led to the arrest in the past of non-Indian hunters on the Reservation(App.p.131a-133a). Also, state law requires juvenile hunters to obtain a Hunter Safety Certificate, while there is no such tribal requirement. Id at 133.

Finally, the State neglects to mention that the Stipulation contains a provision that "...the [New Mexico] Department [of Game and Fish] considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation." (App.p.134a).

I. The Decision of the Tenth Circuit Does Not Conflict With the Decision of Any Circuit Court of Appeals.

The State argues that there is a direct conflict between the present case and United States v. State of Montana, 604 F.2d 1162 (9th Cir. 1979) cert. granted, No. 79-1128, 48 U.S.L.W. 3661 (April 14, 1980) which allowed dual tribal/state regulation of hunting on the Crow Reservation (the issue of the applicability of state fish and game laws to non-Indians is not before the Court in that case as no Cross-Petition was filed raising the issue).

The decision in United States v. Montana is easily distinguished by the existence there of substantial fee patent land owned by non-Indians. Furthermore, the Ninth Circuit itself distinguished the case before it from the case of Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978), Petition for Writ of Certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980) on the grounds that North Carolina had no substantial interest in the Cherokee fishing program and therefore had no authority to regulate non-Indians fishing on the Cherokee Reservation. The same factor distinguishes the present case from the United States v. Montana. This is indicated by the Tenth Circuit opinion as well as the opinion of the District Court. Thus, the Tenth Circuit observed:

> In the factual situation presented by this case, the State is unable to claim that either it or its lands played any significant role in the creation and preservation of the reservation wildlife resources. Instead, much of the reservation wildlife is

effectively a creation of the Tribe and the federal government. For example, the antelope population of the reservation is non-migratory, and few animals ever cross the boundaries. In recent years, the herd's protection has been entirely in tribal hands. Furthermore, the Tribe has taken affirmative steps to build an elk herd. Prior to 1966, only 13 elk grazed in the general area of the reservation. In 1966-67, the National Park Service donated 162 elk. Through considerable range development, the Tribe removed cattle from direct competition with the elk for grazing land. The elk herd has grown to 1200, many of which wander off the reservation during part of the year. The migratory elk thus provide significant hunting opportunities for non-members outside the reservation, and the Tribe, despite its fundamental role in herd development, makes no attempt to limit that hunting.

The reservation has no natural lakes. Several man-made lakes have been constructed with federal funds and are stocked from a national fish hatchery on the reservation. Federal officials from the hatchery also provide the Tribe with technical assistance. The State has never stocked reservation lakes and no longer stocks any reservation streams. The entire tribal fishing program now exists independent of the State. Pet. 5a, 6a.

The District Court, after reviewing the facts similarly conclude that "In short, the Tribe conducts its complete fish and game management program exclusive of the State of New Mexico." (Pet. p.34a).

The Tenth Circuit itself specifically distinguished United States v. State of Montana on two grounds:

a. The Ninth Circuit assumed that Tribal-State cooperation would be forthcoming (604 F.2d at 1172). By contrast, "Because of the Mescalero Apache Tribe's clear position in the case, we [the Tenth Circuit] may make no such assumption." Pet. 13a at f.11 eleven.

b. The State's regulation was needed for conservation and proper management (604 F.2d at 1166). See also 604 F.2d 1170 - Preservation of fish and game requires state involvement. By contrast, the Mescaleros have done an exemplary job of managing their game and fish and no state regulation is required. (Pet.5a).

The Fourth Circuit in Eastern Band of Cherokee Indians at 79, f.n. 3 made clear that each case of state regulation of on-reservation hunting and fishing is unique and may result in different holdings depending on differing variables. Because of the importance of the facts of each case, little would be gained by this Court's review of the Tenth Circuit decision. Also, there is no need for this Court to grant the State's Petition to resolve any conflict among the Circuits as no conflict exists.

II. The Tenth Circuit's Concept of Tribal Sovereignty Is in Line With Decisions of This Court.

The State argues that a court may make a finding of sovereignty only after applying the federal preemption and infrigement of tribal government tests. Only if one of these two approaches oust state jurisdiction may a court conclude that sovereignty exists according to the State's approach.

The State's argument is contrary to every statement on the subject ever made by this Court. The infrigement test of Williams v. Lee, 358 U.S. 217 (1959) would not exist if sovereignty did not exist independent of the test since it is precisely state infrigement of tribal sovereignty which is forbidden by the test. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id at 220. The right to make the rules by which one is governed is the essence of sovereignty and this right is assumed to be one of the attributes of Indian tribes. The question is whether state action infringes on that right, not whether the right itself exists.

As for federal preemption, this Court in White Mountain Apache Tribe v. Bracker, ————U.S. ————————, 65 L.Ed2d, 665, 672, (1980) specifically stated that "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law." Thus, sovereignty is not a conclusion which derives from analysis. Rather it is an aid to analysis. It exists unless specifically taken away by Congress. White Mountain Apache Tribe v. Bracker, supra; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

The Tenth Circuit's approach of assuming sovereignty and then applying the federal preemption and tribal infringement tests in light of that sovereignty is precisely the approach required by this Court. It is pertinent that the Tenth Circuit explicitly states it does not rely on tribal sovereignty alone to conclude that state power is preempted (Pet.14a).

No purpose would be served in reviewing the Tenth Circuit Opinion.

III. The Tenth Circuit's Conclusion That Federal Law Preempts State Jurisdiction Over Hunting and Fishing on the Mescalero Apache Reservation Is Sound and Should Not Be Reviewed.

The Tenth Circuit Opinion makes clear that its preemption analysis must be considered in "light of the Tribe's inherent powers over reservation land and wildlife..." (Pet.p.14a). Central to the Court's entire opinion is the fact that wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." United States v. Winans, 198 U.S. 371, 381 (1904). The Tribe has inherent authority over wildlife, stemming largely from the traditional reliance on wild game for basic survival needs. See F. Cohen, Handbook of Federal Indian Law 286.

Utilizing the concept of tribal sovereignty over wildlife to aid its determination, the Tenth Circuit found six factors which had preemptive effect: 1) The Treaty of July 1, 1852; 2) the New Mexico Enabling Act, 36 Stat. 557 (1910); 3) the Indian Reorganization Act of 1934 (IRA) 25 U.S.C. Section 461 et seq; 4) the Tribal Constitution and ordinances enacted pursuant to the IRA; 5) extensive federal developmental assistance; and 6) the negative inferences from Public Law 280.

The starting point of the Court's analysis is the Treaty of July 1, 1852 which places the Tribe "under exclusive federal jurisdiction." This provision in turn sheds light

on the Enabling Act which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States." "In the area of resource management, the treaty language in this case suggests the 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." (Pet.p.15a).

The State objects that this federal dominance preempting state game and fish laws cannot be squared with the case of Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980) reh. denied, August 25, 1980, Petition for Certiorari docketed November 20, 1980, in which no preemption of state taxing power was found. Even assuming arguendo the correctness of the O'Cheskey decision, the Tenth Circuit specifically distinguished the dual regulatory scheme involved in the present case, from the dual taxing scheme involved in the O'Cheskey case. Dual regulatory schemes of necessity create mutual dislocations. Pet. 13a at f.n. 11 ; Washington v. Confederated Tribes of the Colville Reservation, ————U.S.————, 65 L.Ed. 10 (1980) at 32. The many conflicts between the Tribe's seasons, bag limits, and other hunting regulations and those of the State, bear out the accuracy of the observation by the Tenth Circuit. Dual regulation of wildlife is probably inherently inconsistent with the trusteeship duty of the Tribe to manage its wildlife for the benefit of its members. Cf. Pet. p.22a.

Additional sources of federal preemption are the Indian Reorganization Act and Tribal Ordinances passed pursuant to the Tribe's federally-approved Constitution. The Tribe's Constitution specifically authorizes resolutions governing hunting and fishing on the Reservation. In fact, the Tribe's hunting and fishing program implements an overriding federal policy.

Where a tribal enactment implements an overriding federal policy, it has preemptive effect. (Pet.p.16a), citing Fisher v. District Court, 424 U.S. 382, 390 (1976); Cf. United States v. Mazurie, 419 U.S. 544, 556-557 (1975).

That an overriding federal policy is involved here is apparent from the extensive federal participation in the Tribe's wildlife management program. This federal participation is itself preemptive of state jurisdiction. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 591 F.2d 75 (4th Cir. 1978), Petition for Writ of Certiorari voluntarily dismissed, 48 U.S.L.W. 3786 (May 22, 1980).

The federal policy of leaving tribes free to manage their own wildlife is also implied in Public Law 280. While that statute gave states the unilateral option of assuming limited civil and criminal jurisdiction over Indian country (until amended in 1968), it nevertheless protected tribes from losing "any right, privilege, or immunity afforded under Federal treaty, agreement, or statutes with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof." The negative inference is inescapable that these matters are in exclusive tribal and federal control.

Although, not specifically relied on by the Tenth Circuit, 18 U.S.C. Section 1165 which makes it a federal offense to hunt or fish on an Indian reservation without appropriate tribal permission provides further evidence of an overriding federal policy of protecting tribal wildlife and keeping regulatory authority in the Tribe.

It is clear that the Tenth Circuit made "a particularized inquiry into the nature of the state,

federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v. Bracker, supra at 673. This case deals with value generated almost entirely on the Reservation in which the Tribe has a significant interest. There is no perceivable state interest since they do not stock tribal waters and the Tribe's game is either non-migratory, or the effect of its migration is to bolster state hunting off of the Reservation, (Pet.pp.5a-6a).

Furthermore, while the income from tribal programs is significant to the Tribe, the scope of the Tribe's program is miniscule compared to that of the state. For example, in a recent year the Tribe sold 50 elk licenses, while the state sold 14,000. Ten tribal antelope licenses were available, compared to 3500 for the state. Tribal deer licenses permitted the taking of 500 deer; the state issued 100,000 deer licenses (Pet.pp.5a-6a). The federal and tribal interests are thus overwhelming while the State's interest is minimal given the facts of this case. There is no conclusion to be drawn other than that the state authority over hunting and fishing on the Mescalero Apache Reservation has been completely preempted.

IV. Application of New Mexico's Hunting and Fishing Laws on the Mescalero Apache Reservation Would Seriously Infringe on Tribal Self-Government Contrary to the Principles of Williams v. Lee.

The Tenth Circuit noted that the purpose of the Williams v. Lee tribal-infringement test is to "(seek) an accommodation between the interests of the tribes and the Federal Government, on the one hand, and those of the State, on the other." Washington v. Confederated

Tribes, supra at 31. (Pet.pp18a-19a). In that regard, it is very similar to the purpose of the preemption test of White Mountain Apache Tribe v. Bracker, supra.

As the Stipulated facts show, the State has virtually no interest while the Tribe's interest is paramont. Thus, in accomodating state and tribal interests, the scale leans heavily in the Tribe's favor.

As has been shown, conflict between the Tribe's regulatory scheme and that of the State is pronounced. Dual regulatory schemes have produced precisely the mutual dislocation alluded to by this Court in Washington v. Confederated Tribes, supra at 32. The plain fact is that Tribal and State interests are not in harmony. The Tribe sets its bag limits and seasons consistent with the needs for conservation on the Reservation. The Tribe is the only entity with the proper information to do that. The State, in catering to the public at large, may feel it is appropriate to prohibit elk and antelope hunting by the same person in consecutive years so that this hunting opportunity might be spread around. The Tribe may desire to build good will in its tourism business by allowing such hunting in consecutive years. The record indicates problems with State arrests of non-Indian hunters in past years (App.p.131a-134a). Nothing could be more injurious to goodwill than to have a guest at the Inn be arrested upon leaving the Reservation. Yet were dual regulations to apply, a guest would have to comply with State law, which is not in harmony with the needs of the Reservation, or face such arrest. A more direct interference with tribal self-government could not be imagined. The Tenth Circuit Opinion is sound in this regard and need not be reviewed.

CONCLUSION

The State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

George E. Fettinger
FETTINGER & BLOOM
P.O. Drawer M
Alamogordo, New Mexico 88310

Attorneys for Respondent.

Of Counsel:

Kim Jerome Gottschalk
FETTINGER & BLOOM
P.O. Drawer M
Alamogordo, New Mexico 88310

Norman D. Bloom, Jr.
FETTINGER & BLOOM
P.O. Drawer M
Alamogordo, New Mexico 88310

IN THE
United States District Court
FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,

Plaintiff,

vs. No. CIV 395 M

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors
In Office,

Defendants.

STIPULATION

Plaintiff Mescalero Apache Tribe and Defendants State of New Mexico and William S. Huey stipulate as follows:

I. Scope and Use of Stipulation

1. This Stipulation is made for the sole purpose of being introduced in evidence before the District Court to be considered in adjudicating the legal issues presented in this proceeding.

2. The facts and evidence contained in this Stipulation are for purposes of this proceeding only and any appeal taken in connection herewith. They shall not be deemed res judicata for any other proceeding nor snall any party hereto be collaterally estopped or otherwise bound by them in any other proceeding.

II. General Facts

1. The Mescalero Apache Tribe is a federally recognized Indian Tribe governed by its revised constitution of January 12, 1965, which was adopted pursuant to 25 U.S.C. 476. The governing body of the Mescalero Apache Tribe is duly recognized by the Secretary of the Interior of the United States.

2. The Mescalero Apache Tribe occupies the Mescalero Apache Reservation which is presently situated wholly within Otero County, New Mexico.

3. Indian lands within the State of New Mexico consist of nineteen Indian pueblos including Taos, Picuris, San Juan Santa Clara, Pojoaque, Nambe, San Ildefonso, Cochiti, San Felipe, Santo Domingo, Sandia, Isleta, Jemez, Santa Ana, Zia, Tesuque, Zuni, Acoma and Laguna, and seven Indian reservations including Mescalero Apache Reservation, Jicarilla Apache Reservation, the Navajo Reservation, the Navajo (Alamo) Reservation, the Navajo (Canoncito) Reservation, the Navajo (Ramah) Reservation, and the Ute Mountain Reservation. The relevancy of this fact is not conceded by the Mescalero Apache Tribe.

4. The nineteen Indian pueblos and seven Indian reservations located within the State of New Mexico comprise 7,348,563 acres or 11,482 square miles. The

relevancy of this fact is not conceded by the Mescalero Apache Tribe.

III. Treaty of July 1, 1852.

1. At least one representative of the Mescalero Apache Tribe signed a treaty with the United States of America dated July 1, 1852, 10 Stat. 979, which submitted the tribe and its members to the laws, jurisdiction, and government of the United States of America.

2. Article 9 of the Treaty of July 1, 1852, 10 Stat. 979, provided that the United States government would designate, settle and adjust the boundaries of the signatories to the treaty. The terms of the Treaty did not designate any territory as a reservation for the Mescalero Apache Tribe.

3. In 1855 the Mescalero Apache Tribe and representatives of the United States signed a treaty which did in fact designate reservation boundaries for the Mescalero Apache Tribe, but this treaty was never ratified by the United States Senate. The Mescalero Apache Tribe does not concede the relevancy of this fact.

4. The Reservation of the Mescalero Apache Tribe was originally created by a Presidential Executive Order in 1873. Subsequent Presidential Executive Orders relating to the Mescalero Apache Reservation altered the boundaries of the Reservation by deleting from or adding to the original boundaries of the 1873 Executive Order Reservation.

5. The Presidential Executive Orders of February 2, 1874, October 20, 1875, May 19, 1882, and March 24, 1883

each successively cancelled the immediately prior Presidential Executive Order establishing the Mescalero Apache Reservation. The present boundaries of the Reservation are as set forth in the Executive Order of March 24, 1883.

6. The Presidential Executive Orders of March 2, 1909 and October 20, 1910, placed parts of the Mescalero Apache Reservtion in the Alamo National Forest and subjected these lands to the laws pertaining to national forests and provided for use therein by the Indian Service and by individuals comprising the Mescalero Apache Tribe. A Presidential Executive Order of February 17, 1912, rescinded the Presidential Executive Orders of 1909 and 1910 insofar as they applied to the Mescalero Apache Reservation and restored the reservation in all respects to the status existing prior to the Presidential Executive Orders of March 2, 1909 as though the inclusion of the lands within the Alamo National Forest had not been ordered.

IV. Inn Of The Mountain Gods.

1. The Inn of the Mountain Gods is located within the boundaries of the Mescalero Apache Reservation. The Inn is a large resort complex consisting of a hotel, stocked lake, golf course, tennis facilities, and swimming pool.

2. The development and construction of the Inn of the Mountain Gods resort complex was principally financed by the Economic Development Administration (EDA), an agency of the United States Department of Commerce.

3. The Inn of the Mountain Gods resort complex was financed through EDA and other federal funds and one loan of $6,000,000 from the Bank of New Mexico. 90% of the Bank of New Mexico loan is guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U.S.C. Sections 1451-1543. 10% of the loan is guaranteed by the Tribe through an assignment of a Certificate of Deposit in the amount of $600,000 to the Bank of New Mexico. The source of these assigned funds is Tribal funds previously deposited with the Secretary of Interior. $5,400,000 of the loan (which bears interest at an annual rate of 1.1%) was assigned to the New Mexico State Investment Council, a transaction provided for in the initial loan document.

4. The Mescalero Apache Tribe has constructed certain additional facilities at the Inn of the Mountain Gods utilizing both EDA grants (50%) received after the initial grant and Tribal funds (50%). The additional construction includes trap and skeet shooting (clay bird) range, a stables complex, a recreation building related to the golf course, a kitchen addition, toilet facilities for the golf course, air conditioning for the hotel rooms, various signs, paved walkways on the golf course, additional tennis courts, paddle tennis courts and a water treatment facility. Portions of the above are considered public works by EDA and are funded 100% with federal funds.

5. At least 97% of the guests at the Inn of the Mountain Gods are non-Indians from off the Reservation.

6. The Inn of the Mountain Gods is a part of the tourism program established by the Mescalero Apache Tribe to replace anticipated declining income from lumbering enterprises which historically have been the

largest income producing activities within the Mescalero Apache Reservation.

7. The tourism program of the Mescalero Apache Tribe is designed to attract non-Indians to the Reservation as well as to Sierra Blanca Ski Resort which is a Tribal enterprise located off the Reservation. The hunting, fishing, camping and picnicking program of the Mescalero Apache Tribe is a part of its overall tourism program. Package hunts of big game animals are held to help stimulate business at the Inn of the Mountain Gods. Package hunts normally occur between the summer tourism season and the winter ski season. The purpose of the tourism program is to provide income for the Mescalero Apache Tribe which may be used for its governmental purposes and economic development.

V. Hunting and Fishing Program - Mescalero Apache Tribe

1. Pursuant to Article XI, Section 1(c) of the revised constitution of the Mescalero Apache Tribe, the Tribal Council has adopted a general hunting and fishing ordinance purporting to govern all persons, Indian and non-Indian, hunting and fishing on the Mescalero Apache Reservation. The Tribal Council has also adopted an ordinance specifically for the 1977 hunting and fishing seasons which specifies the Mescalero Apache Tribal rules and regulations governing hunting and fishing on the Rreservation for that particular year. Ordinance 77-1 specifically provides: "No state licnese of any kind shall be necessary for any person." The State of New Mexico does not stipulate or concede that this provision in any way prohibits it from imposing a licensing requirement on non-Indians hunting or fishing on the Mescalero Apache Reservation.

2. Any non-Indian seeking to hunt or fish on the Mescalero Apache Reservation must purchase a tribal license. Game tags are issued with each tribal license. These game tags are required by tribal regulation to be attached to game taken on the Mescalero Apache Reservation.

3. The Mescalero Apache Tribe presently employs seven full-time tribal conservation officers who assist a Bureau of Indian Affairs (BIA) range conservationist with certain game management functions. The BIA is also able on occasion to provide additional technical assistance. These tribal conservation officers assist the BIA range conservationist in making aerial surveys and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Mescalero Apache Reservation in order to recommend to the Tribal Council bag limits and seasons for these big game animals. These recommendations are submitted to Tribal Council for its consideration in setting bag limits and seasons for the Mescalero Apache Tribe.

4. All tribal conservation officers have received training in game and fish management and law enforcement. One officer has approximately sixteen years experience in gane and fish management; one has approximately nine years work experience; two have approximately two years experience each; and three have approximately six months experience each.

5. The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a national fish hatchery on the Mescalero Apache Reservation and, pursuant to an agreement with the Tribe, provides technical assistance in the management and development of fishery

resources in Reservation waters and it likewise provides fish for stocking Reservation waters. The agreement, entered into in 1959, also provides that the Mescalero Apache Tribe will establish regulations for the conservation of fishery resources which insofar as possible will be in conformity with the regulations of the State of New Mexico. The fish hatchery is located on Reservation land leased to the Bureau of Sport Fisheries and Wildlife of the Department of Interior by the Tribe. The fish hatchery serves other Indian reservations and Pueblos and federal facilities in New Mexico and surrounding states.

6. There are no natural lakes within the Mescalero Apache Reservation. Several man-made lakes have been constructed over the years with federal funds, some of which also have picnic and camping facilities constructed by the Tribe. The State of New Mexico has never stocked any lake within the Mescalero Apache Reservation. Prior to 1970 the New Mexico Department of Game and Fish and the Bureau of Sport Fisheries and Wildlife stocked streams within the Reservation. Between 1970-76, the Department stocked part of one stream on the Reservation and since 1976 has not stocked this stream. All other waters within the Reservation are stocked exclusively with fish from the National Fish Hatchery at Mescalero. A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation, based upon periodic surveys of all Mescalero Apache Reservation fishing waters.

7. An elk herd numbering 162 elk was released on the Mescalero Apache Reservation in 1966 and 1967. These elk were donated by the National Park Service. The

New Mexico Department of Game and Fish issued a permit for the importation of these elk from Wyoming into New Mexico and generally encouraged this importation. There was some opposition to this importation from one federal agency. It is estimated that there were 13 eld in the general area of the Reservation at the time of the importation in 1966-67. It is estimated that there are approximately 1,200 elk in the general area of the Reservation at the present time.

8. The antelope population within the Mescalero Apache Reservation is non-migratory and these animals seldom, if ever, leave the exterior boundaries of the Mescalero Apache Reservation. A part of the elk, deer and bear populations of the Sacramento Mountains range freely on and off the Mescalero Apache Reservation throughout the year.

9. Horses, cattle and big game compete with one another for the available forage on the Mescalero Apache Reservation. The Tribal Council has made some effort to reduce the wild horse population on the Reservation by entering into one or more contracts for their capture and sale. These wild horses, estimated to number 2,400, unlike the cattle and big game, do no generate significant revenue for the benefit of the Mescalero Apache Tribe.

10. The New Mexico Department of Game and Fish has provided the Mescalero Apache Tribe with any fish or wildlife management assistance which the Tribe has requested, including the training of tribal conservation officers. Such requests have been limited.

11. The hunting brochures written, printed and

distributed by the Mescalero Apache Tribe for the 1971-1976 seasons state that all New Mexico hunting regulations apply to hunting on the Reservation.

12. In response to a Court order previously entered in this cause, the President of the Mescalero Apache Tribe advised all hunters of the Mescalero Apache Reservation by a letter dated September 2, 1977 that all hunters on the Mescalero Apache Reservation are required to hold a 1977 New Mexico hunting license and any game taken from the Reservation must have the Mescalero and New Mexico game tag attached thereon.

13. Federal matching monies (through the Pittman-Robertson Act, 16 U.S.C. 669 et seq. (hunting) and the Dingle-Johnson Act, 16 U.S.C. 777 et seq. (fishing) are allocated to states on a ratio that involves the number of license buyers in the state and the number of acres in the state. To qualify for federal monies under the Pittman-Robertson and Dingle-Johnson acts, the New Mexico Department of Game and Fish may not divert any license fees to any other purpose than the administration of the Department. The territorial area of the Mescalero Apache Tribe (approximately 460,384 acres) is taken into account in calculating New Mexico's share of Pittman-Robertson and Dingle-Johnson Act funds as are the number of state-licensed hunters and fishermen who hunt or fish on the Reservation. No Dingle-Johnson funds have been spent directly within the Mescalero Apache Reservation within the last 6-8 years. In recent years the Pittman-Robertson formula has resulted in an average of $8.44 in federal funds to New Mexico per state-licensed hunter and the Dingle-Johnson formula has resulted in an average of $1.56 in federal funds to New Mexico per state-licensed fishermen.

14. For the years 1972 through 1976, The Mescalero Apache Tribe issued the following number of fishing permits:

1972	9,521
1973	10,985
1974	9,135
1975	19,454
1976	29,163
Total	78,258

State of New Mexico fishing licenses have been required each year for non-indian fishermen either by the Tribe or by court order.

15. Since 1972 approx. 2500 non-Indian hunters have hunted on the Mescalero Apache Reservation. State of New Mexico hunting licenses have been required each year for non-Indian hunters either by the Tribe or by court order.

VI. Hunting and Fishing Program - State of New Mexico

1. There is an interrelationship between the 7,348,563 acres or 11,482 square miles on Indian land within the State of New Mexico and other areas of the State of New Mexico insofar as management and conservation of fish and wildlife are concerned. The quantitative and qualitative aspects of this interrelationship are disputed by the parties.

2. The New Mexico Department of Game and Fish has maintained a fish and wildlife management and conservation program within the State of New Mexico since 1895.

3. The New Mexico Department of Game and Fish is charged by state statute with the responsibility of protecting, conserving and regulating the fish and wildlife resources within New Mexico. The Tribe does not stipulate that this responsibility legally extends to its Reservation. In exercising its statutory responsibility, the New Mexico Department of Game and Fish utilizes fish and wildlife management principles (e.g. herd management concept) which take into consideration the effects of the natural resources of water, plants, soil and animals among other things on the fish and wildlife resources. The New Mexico Department of Game and Fish conservation and management programs recognize that fish and wildlife populations and their habitats are interrelated and comprise a major portion of a complex and dynamic network of relationships, which are an ecosystem. The New Mexico Department of Game and Fish considers these factors in formulating its fish and wildlife conservation and management programs and employs an ecosystem approach, which demands reasonable management of ecosystems and all species contained therein.

4. Indians, non-Indians, residents and non-residents have equal fishing and hunting opportunities on non-reservation public waters and lands within the State of New Mexico.

5. An essential management and conservation mechanism utilized by both the New Mexico Department of Game and Fish and the Mescalero Apache Tribe in controlling the annual harvest of fish and wildlife is the regulation of the number of fishing and hunting licenses issued in conjunction with the length of each hunting or fishing season.

6. The New Mexico Department of Game and Fish is conducting fish and wildlife research projects in a effort to identify existing conditions and to anticipate the future supplies and demands upon the fish and wildlife resources in New Mexico. These studies have assisted in identifying the effects of poaching on the fish and wildlife resources. No New Mexico Department of Game and Fish personnel have entered the Mescalero Apache Reservation to conduct any such fish or wildlife research within the Reservation since 1967.

7. The New Mexico Department of Game and Fish employs 142 commissioned officers who have received training in game and fish management as well as wildlife law enforcement. Within the last ten years, virtually every commissioned officer has had at least a college degree in game management or in a game management related field. In addition, every commissioned officer must attend and complete the State Police Academy law enforcement course and the three week game and fish management and wildlife enforcement course as well as attend an annual week long in-service game and fish management and wildlife enforcement course.

8. The following Schedule A lists the Department of Game and Fish expenditures during the fiscal year periods 1971 through 1976.

These expenditures were made to provide an adequate and flexible operation for the protection of game and fish in the State of New Mexico. These expenditures were used for the propagation of game planning, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the State of New Mexico.

The schedule also indicates the actual Pittman-Robertson and Dingle-Johnson federal reimbursements that were received by the Department during the same period as matching funds under approved projects by the federal government.

The federal matching through Pittman-Robertson and Dingle-Johnson is allocated to the states on a formula of 40% in the ratio which the area of each state bears to the total area of all the states and 60% in the ratio which the number of persons holding paid hunting and fishing licenses.

The total land contribution of Indian lands is 9.4% of the total acreage in the State of New Mexico. The Mescalero Apache Tribe's acreage (approximately 460,384 acres) comprises of .0059 percent of the total New Mexico acreage.

SCHEDULE A

DEPARTMENT EXPENDITURES COMPARED TO FEDERAL AID REIMBURSEMENT FOR FISCAL YEAR 1971 - 1976

FISCAL YEAR	DEPARTMENT EXPENDITURES
60th (1971-72)	$ 2,751,935.39
61st (1972-73)	2,997,421,67
62nd (1973-74)	3,373,935.36
63rd (1974-75)	3,993,831.07
64th (1975-76)	4,457,005.23
65th (1976-77)	5,038,833.05
	$22,612,961.77

PITTMAN-ROBERTSON	DINGLE-JOHNSON	TOTAL FEDERAL MONIES RECEIVED
$ 458,777.97	$ 88,800.00	$ 547,577.97
523,116.10	70,808.87	593,924.97
490,319.43	98,306.83	588,626.26
583,821.26	129,676.30	713,497.56
594,791.66	400,194.30	994,985.96
907,930.27	171,407.61	1,079.337.88
$3,558,756.69	$ 959,193.91	$4,517,950.60

9. The New Mexico State Game Commission has, either upon request or upon its own initiative, amended its hunting and fishing proclamations to accommodate the preferences of the Mescalero Apache Tribe and other Indian tribes with respect to seasons, bag limits and other matters pertaining to hunting and fishing on the Mescalero Apache Reservation and other Indian lands. All such amendments were consistent with adequate fish and wildlife management practices when made. At least one instance on continuing conflict is the State prohibition against the purchase of an elk license two consecutive years by the same person. Tribal ordinance does not contain any such prohibition.

VII. Law Enforcement Activities - State of New Mexico

1. Section 53-2-31, NMSA, 1953 Comp. provides that the hunting and fishing laws and regulations of the State of New Mexico are applicable to "...all Indians off the reservation within this state, or coming into this state from adjoining states, and to all persons hunting on any

Indian reservation with this state...." except that no Indian is required to have a license to hunt or fish within limits of the Reservation where he resides. The State of New Mexico has enforced and intends to continue to enforce its hunting and fishing laws and regulations against non-Indians hunting and fishing on Indian lands, including the Mescalero Apache Reservation. Although all enforcement against non-Indians has in fact taken place off the Reservation, the State of New Mexico does not stipulate to a lack of jurisdiction to go onto the Reservation for such enforcement.

2. The State of New Mexico published literature for the use of the general public which states:

PRIVATE OR INDIAN LANDS

Obtain permission before hunting on private or Indian lands. Nothing in this proclamation shall be construed to authorize hunting on any privately owned land without the landowner's permission nor hunting on any Indian reservation except in conformity with regulations of the State Game Commission and of the Indian tribe.

Indian Reservations

Permission must be obtained before going on any Indian reservation to hunt or fish. A state license is required for non-Indians, in addition to the tribal permit. For each reservation listed, the tribal council has imposed further restrictions within the framework of season dates set forth below. In a few cases, no hunts are offered on the species listed. All dates below refer to 1978 unless otherwise indicated.

The required tribal permits are available only from the tribe involved. For exact information on season dates and availability of permits, contact the tribe directly.

3. In April of 1969, Wendell Chino, President of the Mescalero Apache Tribe, wrote a letter to the New Mexico Department of Game and Fish, as well as to various other agencies including several federal agencies, informing them that their personnel would no longer be welcome within the Reservation without tribal permission. Since that time, in order to avoid the possibility of conflict or confrontation, New Mexico Department of Game and Fish officers have not entered the Mescalero Apache Reservation to enforce state fish and game laws and regulations.

4. The hunting and fishing laws and regulations of the State of New Mexico have never been and are not now enforced against Indians, including members of the Mescalero Apache Tribe, with respect to hunting and fishing activities within Indian lands.

5. The only documented cases of enforcement of hunting and fishing laws and regulations on the part of the State of New Mexico with respect to hunting and fishing activities on Indian land involve non-Indians.

6. In furtherance of their law enforcement duties, New Mexico Department of Game and Fish officers routinely stop persons to ascertain whether the game or fish in their possession was legally taken. Until such a stop is made, it is impossible for the officer to determine where the game or fish were taken and whether such game or fish were taken in accordance with the game and fish laws and regulations of the State of New Mexico.

7. Two Louisiana hunters, Messrs. Shaw and Oliver, holders of Tribal elk licenses, each killed an elk within the Mescalero Apache Reservation in 1976. The State of New Mexico informed the United States Fish and Wildlife Service that these elk had been killed without New Mexico hunting licenses and one of the two hunters had his elk meat confiscated by federal agents. New Mexico State criminal charges were brought against both Oliver and Shaw in Magistrate Court in Otero County, New Mexico, and each party plead guilty to the charges and each party paid a $600.00 fine. The Mescalero Apache Tribe offered to pay their legal expenses if they would challenge the legality of the charges brought against them in the State of New Mexico.

8. On October 6, 1977, New Mexico Department of Game and Fish officers questioned two hunters, Messrs. Crumley and Moretz, who stated that they had been hunting on the Mescalero Apache Reservation without State hunting licenses and that they had been told by an employee at Gibson's in Ruidoso that a State hunting license was not necessary for hunting on the Mescalero Apache Reservation until a kill had been made. The Department of Game and Fish officers did not issue citations for hunting without a State of New Mexico hunting license in this instance. Employees at Gibson's in Ruidoso deny making any such statement to Messrs. Crumley and Moretz and Gibson's tontinues to serve as a vendor of state licenses.

9. On or about October 6, 1977, an individual observed elk meat being packed in a Ryder Rental truck on the Mescalero Apache Reservation and, on his own initiative, he voluntarily related to a New Mexico

Department of Game and Fish officer that 48 elk had been killed by non-Indians in the package hunt on the Reservation in 1977. A New Mexico Department of Game and Fish officer checked the number of state elk licenses which had been sold in the area and found that 43 had been sold. It was also discovered that one of the non-Indian elk hunters on the Reservation had purchased a State elk license the previous year. It is contrary to state law but not contrary to Tribal ordinance to purchase an elk license two years in a row. In addition, it was learned that a non-resident juvenile hunter had not received a Hunter Safety Certificate from his home state as required by the hunting and fishing laws of the State of New Mexico. Based upon this information, a message was given to New Mexico State Police officers to be on the lookout for the Ryder Rental truck. On October 6, 1977, two employees of the Mescalero Apache Tribe, John F. Frye and Reese Tatum,were transporting packaged and frozen elk meat in a Ryder Rental truck from the Mescalero Apache Reservation to El Paso, Texas, and in transit the rental truck, driven by Reese Tatum, was stopped for excessive speed by New Mexico State Police Officer David L. Skinner, approximately 15 miles south of Alamogordo, New Mexico, John F. Frye volunteered the information that the truck was transporting elk meat and agreed to a search of the vehicle by Officer Skinner. Messrs. Frye and Tatum were subjected to a routine, light personal frisk for the protection of Officer Skinner. Officer Skinner asked the two individuals to return with him to Alamogordo, and both Frye and Tatum voluntarily consented to this request. John F. Frye was requested to accompany Officer Skinner in his patrol car, which he voluntarily consented to do. At Alamogordo State Police Headquarters, New Mexico Department of Game and Fish Officer, Tim Barraclough, after obtaining

written consent to search the vehicle from Mr. Frye, began a search of the rental truck to determine whether any of the elk meat belonged to any person who had failed to purchase a state license. The consent to search was orally withdrawn by an attorney for the Tribe and the search thereupon ceased. No arrests were made.

10. The New Mexico Department of Game and Fish has developed an fish and wildlife law enforcement program entitled Operation Game Thief in an effort to encourage public participation in protecting and conserving the fish and wildlife within the State of New Mexico by offering rewards to persons for information concerning alleged violations of the fishing and hunting laws and regulations of the State of New Mexico.

11. Based on information received from hunters filling out questionnaires sent out by the New Mexico Department of Game and Fish and on informal information received from others, the Department considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation.

VIII. Financial Matters

1. From at least 1971 through 1974 all of the big game licenses including deer, elk and bear, authorized by the Mescalero Apache Tribe were sold. During this period a large number of fishing permits was likewise sold by the Mescalero Apache Tribe.

2. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the

1975-1976 hunting season including deer, elk and bear, were sold. During this period 19,454 fishing permits were likewise sold by the Mescalero Apache Tribe.

3. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1976-1977 hunting season, including deer, elk and bear, were sold. During this period 29,163 fishing permits were likewise sold by the Mescalero Apache Tribe.

4. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1977-1978 hunting season, including deer, elk, bear and antelope, were sold except four of the ten antelope licenses which were authorized for the first time in 1977. During this period an undetermined number of fishing permits were likewise sold by the Mescalero Apache Tribe.

5. Many applications for big game licenses and package hunts have had to be turned down each year that they have been made available by the Mescalero Apache Tribe because the number of such applications has exceeded the number of licenses and package hunts that have been made available by the Tribe.

6. For the calendar year 1976, the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and campground and picnicking permits was $269,140. For the Calendar year 1977, the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and campground and picnicking permits was $271,520. There was an undetermined amount of indirect income from non-hunting spouses and children staying at the Inn of the

Mountain Gods in conjunction wit participants in the package hunts. The Mescalero Apache Tribe in turn used part of this income to pay Tribal guides for hunters participating in the package hunts.

7. Based on the number of hunting and fishing permits and package hunts sold by the Mescalero Apache Tribe and the patronage enjoyed by the Inn of the Mountain Gods and other recreational facilities on the Mescalero Apache Reservation during the 1977-1978 hunting and fishing seasons, it is anticipated that the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and the campground and picnicking permits for fiscal year ending June 30, 1978, will be greater than that realized in previous years.

8. The revenues the Mescalero Apache Tribe receives from the sale of hunting and fishing, and picnicking and camping permits and package hunts at the Inn of the Mountain Gods has increased from $7,787 in 1961 to $269,140 in 1976. Prior to and during this period the State of New Mexico has enforced its hunting and fishing laws and regulations against non-Indians hunting or fishing within the Mescalero Apache Reservation. After they have departed the Reservation.

9. The revenues of the Inn of the Mountain Gods have increased annually since it opened in July of 1975.

10. The State of New Mexico will suffer a loss of direct revenue and Pittman-Robertson and Dingle-Johnson funds if it is enjoined from enforcing its licensing requirements against non-Indians hunting and fishing on Indian lands within the State of New Mexico, including the Mescalero Apache Reservation.

IX. Miscellaneous Facts

1. The vast majority of the non-Indian hunters and fishermen on the Mescalero Apache Reservation are non-residents of the State of New Mexico.

2. The public highways of the State of New Mexico as well as other public facilities and services are available for use by persons traveling through the State of New Mexico to hunt and fish on Indian lands within the State of New Mexico, including the Mescalero Apache Reservation.

3. The State of New Mexico provides some services and benefits to members of the Mescalero Apache Tribe residing on the Mescalero Apache Reservation. The relevancy of this fact is not conceded by the Mescalero Apache Tribe.

Respectfully submitted,

FETTINGER AND BLOOM
Post Office Drawer M
Alamogordo, New Mexico 88310

By /S/
Attorneys for Plaintiff

TONEY ANAYA
Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
By /S/
THOMAS L. DUNIGAN
Deputy Attorney General
Attorneys for Defendants